

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 29-79:

BUTTE TEAMSTERS UNION,
LOCAL NO. 2,

Complainant,

- vs -

FINAL ORDER

SILVER BOW COUNTY, MONTANA,
ON BEHALF OF SILVER BOW
GENERAL COUNTY HOSPITAL,
BUTTE, MONTANA,

Defendant.

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Claretta C. Martin on May 21, 1981.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Donald C. Robinson, Attorney for Defendant, on June 5, 1981.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Claretta C. Martin as the Final Order of this Board.

DATED this 24th day of July, 1981.

BOARD OF PERSONNEL APPEALS

By John Kelly-Adair
John Kelly-Adair
Chairman

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO.29-79;

BUTTE TEAMSTERS UNION,
LOCAL NO. 2.

Complainant,

vs.

SILVER BOW COUNTY, MONTANA
ON BEHALF OF SILVER BOW
GENERAL COUNTY HOSPITAL,
BUTTE, MONTANA

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

This unfair labor practice charge was filed by the Butte Teamsters Union, Local #2, against Silver Bow General County Hospital on June 26, 1979. The Complainant requests the Board of Personnel Appeals to remedy the alleged violations by issuing an order requiring the Defendant to:

- 1) Cease and desist in the actions alleged as violations;
- 2) Reinstate with back pay the employment of those nurses' aides laid off by the Defendant's actions;
- 3) Restore the work in contention back to the bargaining unit;
- 4) Any other remedy deemed just and proper.

A pre-hearing conference in this matter was held at 9:30 a.m., September 11, 1979, in the committee room of Silver Bow General Hospital, 2500 Continental Drive, Butte, Montana, before Clarette C. Martin, Hearing Examiner. The purpose of this conference was to clarify issues, identify witnesses, discuss procedures, and to identify possible remedies. During this conference, the Defendant made a motion for a more definite statement. After considering an objection by the Complainant on grounds of timeliness and

1 considering discussion regarding the hearing process, it was
2 ruled that the motions and the procedure within the hearing
3 itself and the relevance will dictate the admissibility and
4 the weight. Stipulations entered into by the parties at
5 this time were that the parties had the right to call additional
6 witnesses not listed as proposed and to offer additional
7 exhibits if warranted. The Defendant made a motion to
8 dismiss the unfair labor practice due to lack of jurisdiction
9 of the Board and due to the merits of the case and the laws
10 governing this case, which were believed to come under the
11 collective bargaining agreement and its administration. The
12 Hearing Examiner took the motion under advisement in making
13 a decision.

14 A formal hearing in this matter was held on two separate
15 days, on September 11, 1979, and on November 30, 1979, in
16 the committee room of Silver Bow General Hospital, 2500
17 Continental Drive, Butte, Montana, before Clarette C. Martin,
18 Hearing Examiner. The hearing was conducted under authority
19 of Section 39-31-405 MCA and as provided by the Montana
20 Administrative Procedure Act (Title 2, Chapter 4, MCA).

21 The purpose of the formal hearing was to determine if
22 the Defendant had committed the alleged violations.

23 Post hearing briefs were submitted by both parties on
24 March 21, 1980.

25 The Complainant was represented by D. Patrick McKittrick,
26 Attorney, Great Falls, Montana. The Defendant was represented
27 by Michael D. Zeiler, Attorney, Edina, Minnesota.

28 The Hearing Examiner issued a Recommended Order July 31,
29 1980. It was ordered:

30 1. This complaint be remanded to the grievance-arbitra-
31 tion procedure in the collective bargaining agreement between
32 the parties. The Respondent will, within ten days of receipt

1 of this Recommended Order, file a written statement with
2 this Board indicating that it is willing 1) to arbitrate the
3 issues, 2) to waive the procedural defense that this grievance
4 is not timely filed;

5 2. The parties will then process this grievance in
6 accordance with the procedures outlined in Article 22 and 23
7 of the Joint Exhibit 1. It was further ordered that this
8 Board retains jurisdiction for the purposes of hearing this
9 complaint as an unfair labor practice if:

10 a. The Respondent does not, within ten days of receipt
11 of this Recommended Order, file a written statement
12 with this Board indicating that it is willing to arbitrate
13 this issue and to waive the procedural defense that
14 this grievance is not timely filed;

15 b. An appropriate and timely motion adequately demon-
16 strates that this dispute has not, with reasonable
17 promptness after the issuance of this Recommended
18 Order, been resolved in the grievance procedure or by
19 arbitration; or

20 c. An appropriate and timely motion adequately demon-
21 strates that the grievance or arbitration procedures
22 were not conducted fairly.

23 On August 22, 1980, Butte Teamsters Union, Local #2,
24 filed exceptions to the Hearings Examiner's Recommended
25 Order. On September 30, 1980, oral arguments were presented
26 by the parties to the Board of Personnel Appeals. The Board
27 deferred ruling on the issue of whether or not it has jurisdic-
28 tion to defer a pending unfair labor practice charge to
29 arbitration. The Board reserved ruling on this issue for
30 another case. The Board remanded the matters at issue in
31 Unfair Labor Practice No. 29-79 back to the Hearing Examiner
32 to render a determination on the merits of the unfair labor

1 practice charges as filed by the Complainant.

2 II. ISSUES

3 The Complainant's charges allege that on or about June
4 21, 1979, the Defendant, by its officers, agents, and represen-
5 tatives has refused to bargain in good faith, and has violated
6 Section 59-1605, RCM, 1947, 1 (a, b, c, e, and 3); Sections
7 39-31-491, 1, 2, 3, 5 and 39-31-305, 2 MCA by the following
8 acts:

9 1. By calling and conducting meeting of nurses' aides
10 for purposes of discussing wages, hours, and other terms and
11 conditions of employment without the approval of the exclusive
12 collective bargaining representative, Butte Teamsters Union,
13 Local #2.

14 2. By threatening to lay off nurses' aides and assign-
15 ing unit work, covered by the contract, to non-unit employees.
16 The Complainant alleges that the Defendant, by the above
17 acts and by other acts and conduct, has interfered with,
18 restrained, and coerced its employees in the exercise of the
19 rights guaranteed them by law.

20 III. ADMINISTRATIVE NOTICE AND MOTIONS,

21 RULINGS ON WHICH HAVE BEEN RESERVED

22 OR TAKEN UNDER ADVISEMENT

23 The motion made by the Defendant to dismiss the unfair
24 labor practice charge due to lack of jurisdiction of the
25 Board and due to the merits of the case and the laws govern-
26 ing this case which were felt to come under the collective
27 bargaining agreement and its administration is dismissed.

28 The motion made by the Complainant to conform the
29 pleadings to the evidence is sustained.

30 Administrative Notice, as requested by the Complainant,
31 is taken that Mr. Kelley testified as an adverse witness
32 when called by the Complainant.

1 Administrative Notice, as requested by the Complainant,
2 is taken of the allegation that Mr. Robinson approached a
3 witness, Mr. Kelley, while a subject was being discussed.
4 The Complainant believed Mr. Robinson may have whispered
5 something to Mr. Kelley.

6 Administrative Notice, as requested by the Complainant,
7 is taken that Janice Silver testified as a member of management
8 rather than as a representative of the Montana Nurses Associa-
9 tion.

10 Administrative Notice, as requested by the Complainant,
11 is taken that Ms. Christina Knight, a witness for the Defendant,
12 testified that certain nurses' aides called off work because
13 they did not feel like going, or they did not care to give
14 nursing care to the patients. This testimony was given in
15 response to Mr. Zeiler's question, "Have you ever heard
16 anyone speak of their intent to not come to work because
17 they don't like the way the nursing service is managed?".
18 Under cross examination Ms. Knight refused to name the
19 individuals who made such statements.

20 IV. FINDINGS OF FACT

21 After a thorough review of the record, including the
22 sworn testimony of witnesses and submitted exhibits, these
23 are my findings of fact:

24 1. The Butte Teamsters Union, Local #2, is the sole
25 recognized and exclusive bargaining representative with
26 respect to wages, hours, and other terms and conditions of
27 employment for persons employed at Silver Bow General Hospital
28 in the capacity and classification of nurses' aides, orderlies,
29 operating room technicians, and physical therapy aides
30 (Joint Exhibit #1, TR 11).

31 2. The extant collective bargaining agreement between
32 Silver Bow General Hospital and Butte Teamsters Union, Local

1 #2, is effective from July 1, 1978, through June 30, 1980.

2 3. The pertinent agreements contained in the collective
3 bargaining agreement are as follows:

4 "Now, Therefore, in consideration of the mutual benefits
5 accruing to the respective parties, it is agreed as follows:

6 1. Article 1, Union Cooperation:

7 The Union recognizes the responsibilities
8 imposed upon it as the exclusive bargaining
9 agent for the employees under its jurisdiction,
10 and realizes that in order to provide maximum
11 opportunities for continuing employment, good
12 working conditions, and a high standard of
13 wages, Employer must be able to manage and
14 operate its hospital efficiently and economic-
15 ally, consistent with fair labor standards.
16 The Union, through its bargaining agency,
17 agrees to cooperate in the attainment of
18 these goals.

19 2. Article 2, Union Recognition And Membership:

20 (B) The classification as contained herein
21 and the duties relating thereto, shall be
22 outlined in "Job Description for Hospitals"
23 as prepared by the Federal Department of
24 Labor and the United States Employment Service
25 in cooperation with the American Hospital
26 Association, pertinent condensation of which
27 is attached hereto and made a part hereof.

28 3. Article 5, Work Day and Work Week:

29 (A) The normal work day shall consist of
30 eight (8) hours and the normal work week
31 shall consist of forty (40) hours. The
32 normal work week for these employees classi-
33 fied as nurses aides and orderlies shall be
34 so arranged that two (2) consecutive days off
35 shall be granted each week and days off shall
36 be rotated ahead one day each week... Work
37 Schedules as provided herein may be changed,
38 on a permanent basis, upon notice to the Union
39 and approval of the majority of the employees
40 affected by such change. (underlined emphasis
41 supplied)....

42 (E) Any employee desiring to lay off shall
43 request permission from the Employer's Nursing
44 Director the previous day. In such cases,
45 due consideration must be given to the schedul-
46 ing program and to the availability of accept-
47 able relief.

48 4. Article 6, Hours of Work and Overtime:

49 ...(B) Call Outs: (1) Full time employees
50 called out to work on a regular scheduled day
51 off or on any day on which the employee is
52 granted off as a low census day shall be paid
53 one and one half (1½) times their regular
54 rate of pay and shall be guaranteed eight (8)
55 hours work or pay and shall not be required
56 to take another day off. (emphasis supplied).

57 5. Article 9, Health and Welfare:

58 ...(B) Eligibility for coverage of employees
59 under this article shall be limited to employees

who work eighty (80) hours or more in the preceding month.

6. Article 15, Management Rights:

(A) The Employer reserves the right of management to make and promulgate all rules, regulations, and policies not inconsistent herewith which in its judgment are necessary to maintain an effective and efficient patient care program and to maintain the status of its hospital as an accredited institution. The Employer will maintain such work force as, in its judgement may be necessary to accomplish this objective in accordance with the standards and approval of the National Commission on Hospital Accreditation. (emphasis supplied)

(B) The General Hospital personnel policies, as stated in the booklet adopted by the Board of County Commissioners June 1, 1960, shall be recognized.

(C) The Union will be notified of any change in the personnel policies of the Hospital when Union members are effected. (emphasis supplied)

7. Article 17, Seniority:

(A) Seniority, by classification, shall be recognized after 3 months of full-time continuous service. In case of reduction of forces, the last hired will be the first laid off, the last laid off will be the first to be re-hired. Employees to be re-hired will be notified by registered mail sent to the last known address of such employee. The Employer reserves the right to be the sole judge of the competence and acceptability of its employees during the first 3 months probationary period.

(B) In order to maintain effective and efficient continuity of operation, the Employer may change shift assignments. However, except in cases of emergency, the employee shall be consulted, and due consideration shall be given to the right of seniority as set forth in this Article. Conversely, the employee's application to change shifts shall receive equal consideration. Such application shall be made by registering such desire with the Director of Nursing prior to the time a vacancy may occur.

(C) In accordance with hospital practice and procedures, floor or area assignments cannot be considered to be permanent and inflexible. If transfer is necessary, or if a shortage of work develops in one department, floor or area, the least senior employee may be transferred to another department, floor, or area of the hospital in order to maintain adequate service for the welfare of the patients and to insure economy of operation for the hospital. The Employer agrees to make such transfer where failure to do so might result in lay off or loss of time for the employee.

(D) TERMINATION OF EMPLOYMENT: The reasons for termination of employment, other than force reduction shall be the same as outlined

in present appropriate General Hospital policies.

(E) After the first 3 months of employment, when such employment is terminated for a reason other than force reduction, full explanation shall be given to the employee and except in cases of misconduct, the employee shall be given seven (7) days notice. All terminations shall be subject to the grievance procedures at the option of the employee. Such option shall be exercised within five (5) days following termination.

8. Article 18, Assignment of Bargaining Unit Work:
Bargaining unit work shall be assigned by classification as contained herein. Any person not in the bargaining unit covered by the Agreement shall not regularly (emphasis supplied) perform any of the work of the employees in the bargaining unit. Nothing contained herein is intended to prevent the normal lap-over of job duties in nursing service positions (Nurses Aides, L.P.N.'s, Orderlies, R.N.'s); nothing herein shall supercede any federal or state laws or regulations which may require supervisory personnel to personally perform that which might be considered bargaining unit work (emphasis supplied).

9. Article 22, Grievance Procedure:
...(B) In the event of any dispute or difficulty arising under the terms of this Agreement, it will be handled by the Conference Committee. If the Conference Committee is unable to reach an agreement the matter will be handled by a duly authorized representative of the Union with the administrator of the hospital, provided the appeal is made within ten (10) days from the date of the decision of the Conference committee. If the controversy cannot be settled within an additional fourteen (14) days, the matter shall then be referred to the Chief Executive of Butte Silver Bow, Montana.

10. Article 23, Arbitration Procedure:
...The parties agree that any differences involving the interpretation of this Agreement, which cannot be settled amongst themselves may be submitted to arbitration upon the request of either party.
...(C) The Board of Arbitration shall have authority only to deal with differences between the parties involving the interpretation of this Agreement, and shall not have the authority to alter or add to the terms of this Agreement... and any case referred to the Board by either party on which the Board has no power or authority to rule shall be referred back to the parties without decision.

11. Article 25, Term of Agreement:
(A) This Agreement shall become effective on the first day of July, 1978 and shall continue in full force and effect until June 30, 1980 when it automatically renews itself and continues in full force and effect from year

1 to year thereafter, unless written notice is
2 given by either party to the other, not less
3 than sixty (60) days prior to the expiration
4 date that changes are described in its provisions.
5 Provided, however, that if any changes are to
6 be proposed in employee wages or other provisions
7 which may reasonably be expected to increase
8 hospital costs, such proposed changes shall
9 be made known to the Employer, by written
10 notice, at least sixty (60) days prior to the
11 30th of May in any year.

(B) The written notice, as provided for in
Part (A) shall contain the proposals to be
desired to be written into the new or amended
Agreement.

(C) This Agreement shall be and remain in
full force and affect during any period of
negotiation."

12 All the above quoted Articles and Parts are excerpts
13 from the 1978-1980 contract as found in Joint Exhibit #1.

14 4. In Article 21 of the contract, the parties agreed there
15 would be no strike or lock-out for the duration of this
16 Agreement.

17 5. Article 18 is a new contract provision. Such an agreement
18 had not been included in the previous contract between the
19 parties (See Joint Exhibit #1 as compared to Joint Exhibit
20 #2).

21 6. The duties and responsibilities of the nurses' aides
22 are found in Job Descriptions provided in Defendant Exhibit
23 #3. They are: "Responsible, as a member of the health care
24 team to perform simple, direct, patient care, and other
25 related activities under the direction of licensed personnel.

26 A. Provide assigned personal care to meet the needs
27 of the patient such as bathing, hair, mouth, and skin
28 care and other nursing efforts necessary to the general
29 comfort of the patient.

30 B. Give constant attention to the safety of the
31 patient and his environment by careful application of
32 the hospital policies and procedures regarding bed
rails, restraints, assistance where required, etc.

C. Perform basic nursing arts such as taking tempera-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

- ture, pulse, respiration, admitting and dismissing, giving enemas etc., as indicated on the orientation check list distributed by the Director of Education.
- D. Participate in patient care conferences, in-service education programs, etc., which will maintain and/or increase nursing knowlege and skills.
- E. Participate in nursing service standing committee concerned with making recommendations concerning patient policy and procedure.
- F. Be aware of hospital organization, nursing service philosophy, policies and procedures through use of policy and procedure books at the nurses station.
- G. Report signs of change to the appropriate person.
- H. Assist in maintaining the unit in a sanitary condition
- I. Record and report accomplishments in appropriate place and/or to appropriate person.
- J. Contribute to a calm orderly atmosphere conducive to efficient performance on the unit.
7. Past practice at Silver Bow General Hospital has been to provide nursing services under a Team Patient Care concept. This fact is clearly supported by Mr. Robert's testimony (TR 315). Mrs. Kotan's testimony (TR 211), and Mr. Kelley's testimony (TR 159). It is difficult to ascertain the specific type and amount of nursing care duties performed under the Team Patient Care concept by nurses' aides as opposed to those performed by L.P.N.'s and/or R.N.'s. However, Mrs. Kotan's testimony (TR 211) that "... Um, we did use the team method of nursing and the functional method of nursing care and that fragmented nursing. A certain group gave one care, a certain group gave another kind of care, and a certain group gave another type of care..." conclusively demonstrates

1 that under the Team Patient Care concept nurses' aides,
2 L.P.N.'s, and R.N.'s each had certain types of patient care
3 for which they were primarily responsible and which they
4 performed for the most part, exclusively. I find that basic
5 nursing care, such as, "personal care of patient, and passing
6 trays and feeding, temps, pulses, and just taking care of
7 them...", (TR 105) and as specifically outlined, in Finding
8 of Fact #6, were the primary work responsibilities of nurses'
9 aides and were essentially performed exclusively by nurses'
10 aides. This finding is further substantiated in the collective
11 bargaining agreement, Article 2, as found in Joint Exhibit 1
12 and noted in Finding of Fact #3.

13 8. The collective bargaining agreement was signed by Silver
14 Bow General Hospital with full knowledge and intent that the
15 status quo, regarding nursing services provided by nurses'
16 aides, was preserved. This finding is clearly supported by
17 Mr. Murphy's testimony that, "...our interpretation of this
18 language in conjunction with language in other sections of
19 the contract led us to conclude that this language did not
20 affect, in essence the, the ability of the, did not affect
21 management's rights ah, did not ah, ah, proscribe any practice
22 that was or policy that was presently enforced in the hospital.
23 Ah, it,... really pre, preserved the status quo and for that
24 reason we elected to approve and sign off this particular
25 ah, contract section change" (TR 127). Mr. Murphy was
26 employed as the hospital's Administrator from July of 1977
27 through February 19, 1979. During the negotiating sessions
28 which resulted in the contract Mr. Murphy was head of the
29 hospital's bargaining team. The above quoted testimony was
30 in answer to a question from Mr. Zeiler regarding Article
31 18.

32 9. During the negotiations which resulted in the contract,

1 there was no discussion regarding the implementation of a
2 Total Patient Care Plan in nursing services at Silver Bow
3 General Hospital (TR 246).

4 10. Traditional staffing practices during low census periods
5 are as follows:

6 A. Notice of an impending need for nursing staff to
7 take low census days was given in written and oral
8 form, seeking volunteers. If there was not a sufficient
9 number of volunteers, then the low census days were
10 assigned on a seniority basis. (TR 128, 129).

11 B. The manner in which low census days were distributed
12 among the nursing services depended on the seriousness
13 of the low census problem. If there was only a modest
14 decline in the census, the needed low census days were
15 assigned to the nurses' aides. If the low census
16 problem was more serious, low census days were given
17 across all classifications (TR 129, 130).

18 C. There had not previously been layoffs during low
19 census periods (TR 137).

20 D. If such a layoff were to occur during a low census
21 period, such as the summer months, notice of such
22 layoff would affect all the personnel (TR 137).

23 E. Time given off during the low census periods was
24 not for an extended period of time, such as the entire
25 summer. Typically, an individual might take "two
26 weeks" or "four days" (TR 140). As a general rule, low
27 census days were given on a day to day basis (TR 79).

28 11. A meeting was held on June 19, 1979, by the management
29 of Silver Bow General Hospital with the nurses' aides.
30 Notice of this meeting was posted approximately June 15,
31 1979, (TR 219, Defendants Exhibit #1). At this meeting, the
32 management of Silver Bow General Hospital was represented by

1 Mrs. Kotan, Director of Nursing, who conducted the meeting.
2 Also present for management was Mrs. Lester, Day Shift
3 Supervisor (TR 13, 220, 266). This meeting was sanctioned
4 by Mr. Kelley, Administrator of Silver Bow General Hospital
5 (TR 13). At this meeting Mrs. Kotan announced that it would
6 be necessary to furlough approximately 21 nurses' aides.
7 She announced this would be done according to seniority but
8 that those with seniority could elect to take the furlough
9 if such request was submitted in writing to the nursing
10 service office. Mrs. Kotan also informed the nurses' aides
11 that the benefits would continue for those on the furlough
12 until the time of another decision. According to Mrs.
13 Kotan's testimony such benefits would include insurance
14 premiums and pension (114). She further announced that the
15 furloughed nurses' aides could apply for unemployment and
16 the hospital would not contest it (TR 220).

17 Mrs. Lester testified the nurses' aides were told the
18 layoff was necessary because of the low census (266, 267).
19 Mrs. Lester also testified that the nurses' aides were told
20 that during the low census period management "would be
21 trying the low, the total patient care concept." (TR 270).
22 Mrs. Lester also testified that she and Mrs. Kotan had
23 explained what the Total Patient Care concept was and that
24 under this concept patient care formerly provided by nurses'
25 aides would be shifted to L.P.N.'s and R.N.'s (TR 270).
26 Mrs. Lester further testified that at this meeting the
27 nurses' aides were told that the layoff would continue until
28 the low census period ended and that they did not know when
29 that would be (TR 272). She testified that the nurses'
30 aides were told that they would be called back "...as we
31 needed them." (TR 272).

32 12. Eighteen nurses' aides were laid off (TR 238, 272).

1 The layoff was initiated July 1, 1979 (TR 238).

2 13. The Butte Teamsters Union, Local #2, was not notified
3 of the June 19, 1979, meeting (TR 44).

4 14. Mr. Roberts, then President of Teamsters Union Joint
5 Council #2 and Local #2, responsible for administering and
6 negotiating their labor agreements, was not present at the
7 June 19, 1979, meeting (presumably due to lack of notification
8 as noted in Finding of Fact #13) and became aware of the
9 contents of that meeting after being contacted and receiving
10 complaints from bargaining unit members who had attended the
11 meeting (TR 68, 69).

12 15. Management of Silver Bow General Hospital drafted and
13 mailed a letter to Mr. Leo Lynch, then Business Representa-
14 tive of Butte Teamsters Union, Local #2, to notify the Union
15 of the impending layoff due to low census in the summer
16 months. This letter, which was testified as being mailed
17 June 18, 1979, appears not to have reached Mr. Lynch (TR 71,
18 177, 178, See Defendant Exhibit 2).

19 16. A meeting was held June 22, 1979, in response to a
20 telephone call from Mr. Roberts. Mr. Roberts wished to ask
21 some question concerning the impending action of the Hospital
22 (TR 163). Present at this meeting were Mr. Kelley, Mr.
23 Roberts, Mrs. Kotan, and others (TR 17). The major events
24 which transpired at this meeting are as follows:

25 A. Mr. Roberts asked Mrs. Kotan to inform him of the
26 reasons why the hospital's management held the June
27 19th meeting (Complainant Exhibit 5) and requested she
28 explain what she was going to do with regard to the
29 nurses' aides (TR 222).

30 B. Mrs. Kotan informed Mr. Roberts that the hospital
31 intended to meet the patients' needs utilizing the
32 Total Patient Care Concept (TR 223) and that there

1 would be a layoff of approximately 21 nurses' aides due
2 to the low census.

3 C. Mr. Roberts strongly objected to the hospital's
4 following actions:

- 5 1) By passing the exclusive bargaining representa-
6 tive and discussing contract changes directly
7 with the nurses' aides. He informed Mrs.
8 Kotan that such action constituted an Unfair
9 Labor Practice (Complainant Exhibit 5).
- 10 2) Having unit work done by others under the
11 Total Patient Care concept. He informed Mrs.
12 Kotan that the Union would do whatever was
13 necessary, including unfair labor practice
14 action, to protect the members of the bargain-
15 ing unit (Complainant Exhibit 5).

16 D. Mrs. Kotan informed Mr. Roberts of her understanding
17 that the action was permissible under their management
18 rights clause and that she intended to go ahead and
19 implement the Total Patient Care concept (Complainant
20 Exhibit 5, TR 245).

21 17. R.N.'s and L.P.N.'s are currently working under the
22 Total Patient Care concept and are performing work which was
23 formerly performed by nurses' aides (TR 16,46,47).

24 18. R.N.'s and L.P.N.'s are not in the same bargaining unit
25 as the nurses' aides (TR 47).

26 19. Past practice has been that L.P.N.'s were responsible
27 for giving medication and treatments. The giving of patient
28 care was not part of their normal work (TR 142).

29 20. Since August 1979, the patient census has steadily
30 increased and no staffing changes were made in response to
31 the additional patient load (TR 237). Mr. Kelley testified
32 that, in his estimation, the low census period ended in

1 October of 1979 (TR 195).

2 21. None of the 18 full time nurses' aide positions which
3 were laid off have been re-added to the nursing services
4 staff. Also, according to Mr. Kelley, those individuals who
5 were laid off either have found other employment or have
6 come back on staff to replace openings which occurred through
7 attrition (TR 176, 237).

8 22. On June 22, 1979, Janice Silver, head nurse of second
9 floor and ICU, held a meeting of nurses' aides during which
10 she announced that a new type of patient care was to be
11 delivered, the Total Patient Care concept, and identified
12 the roles of the R.N., L.P.N. and nurses' aide in the new
13 patient care concept. The lay offs were also discussed at
14 this meeting (TR 279, 280).

15
16 The Defendant has submitted no specific proposed findings
17 of fact. The Defendant discussed many alleged facts in his
18 Post Hearing Brief and concluded by requesting, "Findings of
19 Fact: That the facts as presented in the foregoing Respondent's
20 Post Hearing Brief be adopted with all the referenced supporting
21 evidence from the record". In response to the Defendant's
22 general request to adopt his unspecified proposed findings
23 of fact, I have arrived at the above findings of fact after
24 a careful review of the record, including sworn testimony
25 and evidence contained therein. All alleged findings of
26 fact inconsistent with my findings of fact are hereby expressly
27 denied.

28 V. DISCUSSION

29 The record clearly establishes that it has been the
30 past practice at Silver Bow General Hospital to provide
31 nursing services under a Team Patient Care concept (Finding
32 of Fact 7). It is also clear that, under the Team Patient

1 Care concept, nurses' aides, for the most part, exclusively
2 performed basic patient care as set forth in Finding of Fact
3 6 and 7. The nurses' aides' right to perform this work, as
4 had been past practice, was formalized as a contract right
5 for the first time in the 1978-80 contract. The Union
6 bargained for and obtained a work preservation clause,
7 Article 18 (Finding of Fact 3(8)).

8 The legality of such a clause cannot be disputed since
9 it has been established in NLRB v. National Woodwork Manufac-
10 turers Association et. al., 386 U.S. 612 (1967), and Fireboard
11 Paper Corp. v. NLRB, 379 U.S. 203 (1964), that work preserva-
12 tion clauses are a mandatory subject of bargaining concerning
13 "terms and conditions of employment". Therefore, the implemen-
14 tation of a new method of providing nursing services which
15 would take work traditionally performed by the nurses' aides
16 and guaranteed by Article 18, and transfer such work to
17 R.N.'s and L.P.N.'s who are not in the bargaining unit,
18 causing the elimination of full-time staff nurses' aides
19 positions, without negotiating with the Union and obtaining
20 the necessary agreed upon changes in the contract from the
21 Union by the hospital's management would constitute a unilat-
22 eral change by management of the bargaining units terms and
23 conditions of employment under the contract.

24 It is undisputed that Silver Bow General Hospital did
25 implement the Total Patient Care concept of providing nursing
26 services and that R.N.'s and L.P.N.'s are performing work
27 previously performed by nurse's aides (Finding of Fact 17).
28 It is also undisputed that 18 full-time nurses' aides were
29 layed off and that the lay off was initiated July 1, 1979
30 (Finding of Fact 12). None of those full-time positions
31 have been re-added the nursing services staff. Those nurses'
32 aides who were layed off have either found employment elsewhere

1 or have come back on staff to replace openings which occurred
2 through attrition (Finding of Fact 21).

3 The Defendant argued that its actions in laying off the
4 nurses' aides was proper under its management right to
5 maintain such work force as is necessary to maintain an
6 effective and efficient patient care program. The Defendant
7 also argued that the lay off was consistent with past practice
8 during low census periods, such as the summer months.

9 Regarding the Defendant's former argument, the Hearing
10 Examiner notes that Article 15, managements rights, states,
11 "(A) The employer reserves the right to make and promulgate
12 all rules, regulations, and policies, not inconsistent
13 herewith..." (emphasis supplied). The underlined wording
14 makes it clear that management's rights are limited by the
15 terms of the contract and that management cannot take actions
16 which are inconsistent with or violate other terms of the
17 agreement. Article 18 provides that "...Any person not in
18 the bargaining unit covered by this agreement shall not
19 regularly (emphasis supplied) perform any of the work of the
20 employees in the bargaining unit... Therefore, management's
21 right regarding the maintenance of the work force and possible
22 reduction of such work force has been limited in that a
23 reduction of the work force must be implemented in such a
24 manner that L.P.N.'s and R.N.'s would not regularly perform
25 the work of nurses' aides. The Defendant argues that the
26 performance of the nurses' aides' work by R.N.'s and L.P.N.'s
27 is not proscribed because Article 18 also states that,
28 "...Nothing contained herein is intended to prevent the
29 normal lap-over of job duties in nursing service positions
30 (nurses' aides, L.P.N.'s, orderlies, R.N.'s); ...". The
31 Defendant contends that part of the R.N.'s and L.P.N.'s
32 duties is to provide direct patient care and that they have

1 routinely provided such care. The Defendant contends that
2 provisions for such care are provided for in the R.N. and
3 L.P.N. job descriptions. The Defendant further argues that
4 the "normal lap-over of job duties" is understood in terms
5 of the above. Therefore, the R.N.'s and L.P.N.'s would not
6 be precluded from performing basic patient care as is normally
7 performed by nurses' aides.

8 Review of the record indicates that while it is true
9 that R.N.'s and L.P.N.'s duties have included the performance
10 of some basic patient care normally provided by nurses'
11 aides, in past practice, this has not been considered as
12 part of their normal work (Finding of Fact 19). Mr. Murphy,
13 Administrator of Silver Bow General Hospital and Chief
14 Negotiator for the hospital when the contract was negotiated,
15 testified, in essence, that the lap-over occurs when the
16 census is unstable, when staff has been scheduled for a
17 certain patient load and an influx of patients occurs,
18 then, "... people have to pitch in and do the work and that's
19 where the overlap generally occurred..." (TR 142). Therefore,
20 although the Defendant is correct in asserting that R.N.'s
21 and L.P.N.'s may at times provide basic nursing care, past
22 practice is that this is not part of their usual work and
23 that the normal lap-over occurs in the situation described
24 by Mr. Murphy.

25 I must also conclude that the Defendant's contention
26 that the lay off was consistent with past practice during
27 low census periods, such as the summer months, is also
28 incorrect. As outlined in Finding of Fact 10, low census
29 days were temporary in nature and did not constitute a
30 permanent lay off of full-time positions. Low census days
31 were given essentially on a day-to-day basis although an
32 employee might take, for example, "two weeks" or "four days"

1 off during such periods (TR 129, 130). There had not previously
2 been a lay off, as such, during a low census period and if
3 such lay off were to occur, it would have affected all
4 personnel. Therefore, since such a lay off did occur and
5 the lay off was of a permanent nature since the 10 full-time
6 staff nurses' aide positions were not later re-added to the
7 staff, and since the lay off affected only nurses' aides, it
8 must be concluded that the lay off was not consistent with
9 past practice during low census periods.

10 Finally, it must be noted that at the June 19, 1979,
11 meeting, wherein the nurses' aides were notified of the
12 impending lay off, the nurses' aides were also informed that
13 during the lay off the hospital would be trying the Total
14 Patient Care concept. Mrs. Kotan, Director of Nursing,
15 informed them that the Total Patient Care concept would
16 entail a transfer of patient care formerly performed by
17 nurses' aides to R.N.'s and L.P.N.'s (Finding of Fact 11).

18 Therefore, I must conclude, based on the preceding
19 discussion, that on July 1, 1979, the management of Silver
20 Bow General Hospital implemented a new approach to providing
21 nursing services, the Total Patient Care concept. The implementa-
22 tion of the Total Patient Care concept was done under the
23 pretext of a normal low census lay off. This action violates
24 Article 18 of the 1979-80 Agreement and constitutes a unilateral
25 change in the terms and conditions of bargaining units
26 employment by management.

27 Since it is well established in the State of Montana
28 that private sector precedents are relevant in interpreting
29 our statute when its language and that of the NLRA are
30 similar (See Montana Supreme Court in State Department of
31 Highways v. Public Employees Craft Council, 165 Mont. 349,
32 87 LRM 2101 (1974) and that with respect to the scope of

1 bargaining they are almost identical, the following cases
2 will provide conclusive precedent in the instant case.

3 There is a long history of cases where it has been held
4 a violation of the duty to bargain collectively, when an
5 Employer, without first consulting with the Union, makes
6 unilateral changes in wages, hours, and other terms and
7 conditions of employment of an existing contract unless
8 there exists a waiver by the party to whom the duty to
9 bargain is owed. It is also well established that neither
10 party is required to discuss or agree to any modification of
11 the contract if such modification is to become effective
12 prior to the reopening time of the contract. Failure to
13 adhere to the above by one of the parties constitutes a
14 refusal to bargain and violates Section 8(a)(5)(1) of the
15 NLRA and its counterpart, Section 39-31-401, (5)(1) MCA.

16 The case of NLRB v. Sands Manufacturing Co., 306 U.S.
17 332 (1939) was the initial landmark case precedent regarding
18 unilateral changes in an existing contract. The Court
19 stated,

20 "But we assume that the Act imposes upon the
21 employer the further obligation to meet and bargain
22 with his employees' representatives respecting
23 proposed changes of an existing contract and also
24 to discuss with them its true interpretation if
25 there is any doubt as to its true meaning"

26 The cases of Rapid Roller Co., v. NLRB, 126 F.2d. 452 (1942)
27 and Carroll Transfer Co., 56 NLRB 935 (1944) cite and follow
28 the Sands Manufacturing Co. case closely. The decision of
29 the NLRB in the Carroll Transfer Co. case illustrates the
30 solidarity of opinion on this issue wherein it states,

31 "It is now well settled that the statutory duty to
32 bargain does not cease with the execution of the
33 collective agreement. The employer is under the
34 further duty to negotiate with the accredited
35 bargaining agency concerning the modification,
36 interpretation, and adjustment of the existing
37 agreement."

38 In the case of the NLRB v. Hattig Sash and Door Co., 151

1 NLRB 470 (1965), 377 F.2d. 964 (1967), the NLRB was held
2 warranted in finding that the Employer violated Section
3 8(a)(5) of the NLRA by unilaterally reducing the wages of
4 employees without first bargaining with the Union. This
5 finding was held warranted even though the Employer informed
6 the Union of its intent to reduce wages and held conversation
7 with the Union representatives prior to putting the reductions
8 into effect, since the Employer precluded bargaining by its
9 insistence that the reductions would occur on the date
10 designated regardless of the Union's protests. In the case
11 of C & S Industries, Inc., 158 NLRB 454 (1966) the NLRB
12 found that the Employer violated the NLRA by unilaterally
13 instituting an incentive wage system regardless of whether
14 the Employer made sufficient offer to bargain with the Union
15 since the Employer's action operated as a "modification" of
16 the contract terms within the meaning of Section 8(d) of the
17 Act (39-31-305, (2) MCA). This Section expressly provides
18 that neither party is required to discuss or agree to any
19 modification of the contract terms if such modification is
20 to become effective before the reopening of the contract.
21 Further case precedent is found in Awrey Bakeries, Inc. v.
22 NLRB, 548 2d. 136, 217 NLRB No. 127 (1975), 89 LRRM 1224,
23 (5 CA) 94 LRRM 3152 (1976); Garland Distributing Company,
24 234 NLRB No. 188, 98 LRRM 1197 (1978); Brotherhood of Locomotive
25 Firemen and Enginemen, 168 NLRB No. 93 (1967).

26 Since it has been established that:

- 27 (1) The assignment of bargaining unit work is a mandatory
28 subject of bargaining within the statutory phrase
29 "terms and conditions of employment";
30 (2) The Defendant unilaterally, without negotiation
31 with nor agreement of the duly certified bargaining
32 representative, modified the terms and conditions

1 of the 1978-80 contract by laying off 18 full-time
2 nurses' aide positions and assigning bargaining
3 unit work, formerly performed by the aforesaid
4 nurses' aides, to employees not included in the
5 bargaining unit;

6 I conclude that Defendant's action constitutes a refusal to
7 bargain in good faith and thereby a violation of Section
8 39-31-401, (5) MCA. I further conclude that the Defendant's
9 action interferes with, restrains, and coerces the employees
10 and is a violation of Section 39-31-401, (1) MCA.

11 The Defendant has argued that an offer to follow the
12 grievance procedure satisfies any duty to bargain over a
13 matter to which that procedure may apply. Tinken Roller
14 Bearing Co. v. NLRB, 70 NLRB 500 (1946), enf. den. 161 F. 2d
15 949, 20 LRM 2204 (1947). The Hearing Examiner concludes
16 that the Defendant's argument fails to establish a contractual
17 defense to the charges for the following reasons. First,
18 there is no evidence on the record that the Defendant attempted
19 to bargain or made such an offer to follow the grievance-
20 arbitration procedure. The meeting held on June 22, 1979,
21 was clearly informational in nature and neither party subsequently
22 attempted to utilize the grievance-arbitration procedure.
23 Second, the existence of an agreed upon grievance-arbitration
24 procedure does not, in itself, preclude the finding of an
25 unfair labor practice where an employer has unilaterally
26 modified the terms and conditions of an existing contract.
27 See NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); NLRB
28 v. Buttig Sash & Door Co., 377 F. 2d 964 (1967); C & S
29 Industries, Inc., 158 NLRB 454 (1966).

30 The Defendant has argued that the Board should defer
31 jurisdiction in this case to the agreed-upon method of
32 resolving disputes under the 1978-80 contract. The Board

1 reserved ruling on this issue for another case. Addressing
2 the Defendant's contention, the Hearing Examiner would point
3 out that there exists clear precedent that the presence of a
4 problem of contractual interpretation would not, in itself,
5 deprive the Board of jurisdiction in such cases. NLRB v.
6 C & C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Acme
7 Industrial Co., 385 U.S. 432 (1967); NLRB v. Mastro Plastics
8 Corp., 350 U.S. 270 (1956).

9 The NLRB specifically stated in the C & S Industries, Inc.,
10 supra, case that,

11 "While it is true that a breach of contract is not
12 ipso facto an unfair labor practice, it does not
13 follow from this that where given conduct is of a
14 kind otherwise condemned by the Act, it must be
15 ruled out as an unfair labor practice simply
16 because it happens also to be a breach of contract.
17 Of course, the breadth of 8(d) is not such as to
18 make any default in a contractual obligation an
19 unfair labor practice, for that section, to the
20 extent relevant here, is in terms confined to the
21 "modification" or "termination" of a contract.
22 But there can be little doubt that where an employer
23 unilaterally effects a change which has a continuing
24 impact on a basic term or condition of employment,
25 wages for example, more is involved than just a
26 simple default in a contractual obligation. Such
27 a change manifestly constitutes a "modification"
28 within the meaning of 8(d), and if not made in
29 compliance with the requirements of that section
30 it violates a statutory duty the redress of which
31 becomes a matter of concern to the Board (NLRB)."

32 The NLRB did not defer to arbitration in this case as the
Respondent had urged. Further precedent that the existence
of an agreed upon grievance-arbitration procedure does not
deprive the Board of jurisdiction in such cases is found in
the NLRB v. Buttig Sash & Door Co. case. Here, relying
heavily on the United States Supreme Court's decisions in
C & C Plywood Corp. and Acme Industrial Co., cases, the
Court held the following. The NLRB was warranted in finding
that the Employer violated Section 8(a)(5) of the NLRA
despite the assertion of the Employer that it has relied
upon interpretation of the collective bargaining agreement

1 to justify its action. Relying upon the Supreme Court's
2 decisions, the Court stated that the presence of a problem
3 of contractual interpretation did not, in itself, deprive
4 the NLRB of jurisdiction even though the contract contained
5 a grievance-arbitration provision, and that the NLRB had not
6 exceeded its jurisdiction in such evaluation as it made of
7 the Employer's contractual defense. The Court further held
8 that the NLRB had jurisdiction to determine whether or not
9 the Employer had violated Section 8(a)(5) of the NLRA even
10 though the Union had not utilized the contract's grievance-
11 arbitration procedure. The Court held that the grievance-
12 arbitration procedure was not exclusive here and that there
13 is no automatic mutual exclusiveness as between the contractual
14 remedy and the unfair labor practice remedy. It is my
15 opinion that the above cited cases would be controlling in
16 the instant case.

17 The second major question raised was whether or not the
18 Defendant, by its action, violated 39-31-401.(2) MCA. The
19 purpose of this provision is to insure that the duly certified
20 bargaining representative of the employees will not be
21 controlled by an Employer or dependent on the Employer's
22 favor and thereby unable to provide wholehearted, undivided
23 representation to the employees it purports to represent.
24 There is no evidence on the record or the Findings of Fact
25 derived therefrom that the Defendant, by its actions, attempted
26 to dominate, interfere, or assist in the formation or administration
27 of the Union in the manner this provision was implemented to
28 prevent.

29 The third major question to be resolved is whether the
30 Defendant, by its actions, violated Section 39-31-401, (3)
31 MCA. What is at issue here is whether the Employer intended
32 to encourage or discourage membership in the Union. It is

1 generally accepted that the Employer's purpose is the deter-
2 mining factor in ascertaining whether an unfair labor practice
3 of this sort has occurred when an Employer discriminates
4 among its employees. However, it is also well established
5 that specific anti-union purpose need not be demonstrated in
6 certain cases. Controlling principles where anti-union
7 purpose need not be specifically demonstrated are,

8 "First, if it can be reasonably be concluded that the
9 Employer's discriminatory conduct was "inherently
10 destructive" of important employee rights, no proof of
11 an anti-union motivation is needed and the Board (NLRB)
12 can find an unfair labor practice even if the employer
13 introduces evidence that the conduct was motivated by
14 business considerations. Second, if the adverse effect
15 of discriminatory conduct on employees' rights is
16 "comparatively slight", an anti-union motivation must
17 be provided to sustain the charge if the employer has
18 come forward with evidence of legitimate and substantial
19 business justification for the conduct." NLRB v. Great
20 Dane Trailers Inc., 87 S. Ct. 1792, 1798.

21 "If the conduct in question falls within the "inherently
22 destructive" category, the employer had the burden of
23 explaining away, justifying, or characterizing "his
24 actions as something different than they appear on
25 their face", and if he fails, "an unfair labor practice
26 charge is made out". NLRB v. Erie Resistor Corp., 83
27 S. Ct. at 1145.

28 "And even if the Employer does come forward with counter
29 explanations for his conduct in this situation, the
30 Board (NLRB) may nevertheless draw an inference of
31 improper motive from the conduct itself and exercise
32 its duty to strike the proper balance between the
33 asserted business justifications and the employees'
34 right in light of the Act and its policy." NLRB v.
35 Erie Resistor Corp. 83 S. Ct. at 1145

36 Applying the above principles to this case, the major ques-
37 tion is whether the employer's conduct was "inherently
38 destructive" or "comparatively slight". While it is true
39 that the Defendant presented evidence of substantial legiti-
40 mate business justification, this consideration must be
41 weighed against the fact that the Employer's action constituted
42 a unilateral change in the terms and conditions of employment
43 of the existing contract and resulted in the permanent lay
44 off of 18 full-time staff bargaining unit positions which,
45 according to the Complainant constitutes 25% of the bargaining

1 unit. I conclude that the Employer's action was "inherently
2 destructive" of important employee rights, that such action
3 severely undermined union membership, and that if the action
4 was not corrected, it would undermine the Union constituent's
5 confidence in the union, thereby discouraging Union membership.
6 Therefore, since the Defendant's actions were "inherently
7 destructive", I conclude that a violation of 39-31-401(3),
8 MCA has occurred and that the proper remedy must be implemented
9 to restore the proper balance between the asserted business
10 justifications and the employee rights guaranteed by Montana
11 Statute.

12 The final question to be resolved is whether the Defendant
13 has committed a violation by calling and conducting meetings
14 of the nurses' aides for the purposes of discussing wages,
15 hours, and other terms and conditions of employment without
16 the approval of the exclusive bargaining agent, Butte Teamsters
17 Union, Local #2.

18 The record clearly establishes that on at least two
19 occasions the hospital held meetings with the nurses' aides
20 wherein the impending lay off of nurses' aides; the implementa-
21 tion of the Total Patient Care concept; and the ramifications
22 of the Total Patient Care concept on bargaining unit work
23 were discussed (Finding of Fact 11, 22). The record further
24 establishes that at the June 19, 1979 meeting, the continuance
25 of benefits provided for in the 1978-80 contract and the
26 possible additional benefit of unemployment insurance were
27 discussed in regard to the nurses' aides affected by the lay
28 off (Finding of Fact 11). Since it is well established that
29 the assignment of bargaining unit work and the benefits
30 discussed at the aforesaid meetings are mandatory subjects
31 of bargaining within the meaning of the phrase "wages,
32 hours, and other terms and conditions of employment" and

1 since the Union was not notified of such meetings, nor
2 present at such meetings, nor gave its express or implied
3 approval of the discussion of such matters by the hospital
4 with the employees for whom it is the exclusive bargaining
5 representative, I conclude that the Defendant bypassed the
6 exclusive bargaining in the discussion of these mandatory
7 subjects of bargaining. Therefore, the Defendant has failed
8 in its duty to bargain in good faith and has violated Section
9 39-31-401, (5) MCA. NLRB v. Insurance Agents Intl. Union,
10 361 U.S. 477, 45 LRM 2705 (1960).

11 VI. CONCLUSIONS OF LAW

12 The Defendant violated Sections 39-31-401 (1), (3) and
13 (5) MCA by making unilateral changes in the terms and conditions
14 of employment of the Complainant under the 1978-80 contract.

15 The Defendant violated Sections 39-31-401 (1) and (5)
16 MCA by calling and conducting meetings with the nurses'
17 aides for the purpose of discussing wages, hours, and other
18 terms and conditions of employment, thereby bypassing the
19 exclusive bargaining agent.

20 VII. RECOMMENDED ORDER

21 It is ORDERED that Silver Bow General County Hospital,
22 its officers, agents, and representatives shall:

- 23 1. Cease and desist from making unilateral changes in
24 the terms and conditions of the bargaining unit's
25 employment and to bargain with the exclusive
26 bargaining representative with regard to the
27 implementation of the Total Patient Care concept
28 and/or any changes in the conditions of employment
29 which would affect the agreed upon bargaining unit
30 work.
- 31 2. Recognize Butte Teamsters Union, Local #2, as the
32 exclusive bargaining representative and thereby

1 cease and desist from calling and conducting
2 meetings of nurses' aides in which wages, hours,
3 and other terms and conditions of employment
4 without the approval of said exclusive bargaining
5 representative.

- 6 3. Offer reinstatement to the same or substantially
7 equivalent positions, with back pay to the eighteen
8 (18) nurses' aides who were affected by the July
9 1, 1979, lay off. In accordance with the principles
10 set forth in F.W. Woolworth Co., 26 LARM 1184,
11 back pay shall be computed on the basis of each
12 separate calendar quarter or portion thereof from
13 the date of lay off to a proper offer of reinstatement
14 and/or commencement of work from said offer. Loss
15 of pay shall be determined by deducting from a sum
16 equal to what the nurses' aides would normally
17 have earned during each such quarter, or portion
18 thereof, their net earnings, if any, in other
19 employment during that period. Earnings in one
20 particular quarter shall have no effect upon the
21 back pay liability for any other quarter. Such
22 payments to compensate for loss of wages shall be
23 for "wages" within the meaning of the Social
24 Security Act. In order to insure expeditious
25 compliance with the Board's reinstatement and
26 back-pay order, the Defendant shall be ordered,
27 upon reasonable request to make all pertinent
28 records available to the Board and its agents.
- 29 4. Rescind the establishment of the Total Patients
30 Care concept as implemented during the 1978-80
31 contract and restore the work in contention back
32 to the bargaining unit.

VIII. NOTICE

Exceptions to these Findings of Fact, Conclusions of Law, and Recommended Order may be filed within twenty days of service thereof. If no exceptions are filed, the Recommended Order shall become the Final Order of the Board of Personnel Appeals. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59620.

Dated this 21st day of May, 1981.

BOARD OF PERSONNEL APPEALS


Clarette C. Martin
Hearing Examiner

* * * * *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 21 day of May, 1981:

D. Patrick McKittrick
Attorney At Law
Suite 315
Davidson Building
Great Falls, MT 59401

Silver Bow General Hospital
2500 Continental Drive
Butte, Montana 59701

Donald C. Robinson
POORE, ROTH, ROBINSON & ROBINSON, P.C.
1341 Harrison
Butte, Montana 59701

Jim Roberts
Secretary-Treasurer
Butte Teamsters Union Local No. 2
P.O. Box 3745
Butte, Montana 59701



PAD5:K/30